

BEFORE THE BOARD OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

IN THE MATTER OF THE U.S. BUREAU OF  
LAND MANAGEMENT, APPLICATION NO.  
12334-r, INSTREAM FLOW PORTION ONLY

FINDINGS OF FACT AND CON-  
CLUSIONS OF LAW OF APPLI-  
CATION NO. 12334-04-r-12334-14-r

The above-entitled matter came on regularly for hearing starting on or about September 1, 1977, in Billings, Montana, before the Montana Board of Natural Resources and Conservation and its duly appointed Hearing Examiner, James Driscoll. The Applicant appeared by and through its counsel of record, Thomas Gai. The Montana Department of Natural Resources and Conservation appeared by and through its counsel of record, Richard Gordon. The Montana Department of Health and Environmental Sciences appeared by and through its counsel of record, Mona Jamison. The Montana Department of Fish and Game appeared by and through its counsel of record, F. Woodside Wright and Clayton Herron. The fourteen applicant conservation districts appeared by and through their counsel of record, Gary Spaeth. Utah International, Inc., appeared by and through its counsel of record, Urban Roth. Montana Power Company appeared by and through its counsel of record, James Walsh. Intake Water Company appeared by and through its counsel of record, Henry Loble. Witnesses were duly sworn, and oral and documentary evidence was introduced.

The Board, having read and fully considered the complete record, makes the following Findings of Fact and Conclusions of Law relating to the U.S. Bureau of Land Management, Application No. 12334-04-r - 12334-14r, for instream flows:

TABLE BLM -1

U.S. BUREAU OF LAND MANAGEMENT RESERVATION REQUEST FOR MAINTENANCE  
OF RIPARIAN HABITAT, LIVESTOCK, AND WILDLIFE USES

SUBBASIN	SOURCE	LIVESTOCK AND WILDLIFE USE AMOUNT (af/y)	INSTREAM FLOW (cfs)
Upper Yellowstone	Boulder River	0.53	25
	Bridger Creek	0.22	5
	Stillwater River	0.62	25
	Upper Deer Creek	0.10	5
	Lower Deer Creek	0.28	5
	Yellowstone River	2.4	200
Clarks Fork of Yellowstone	Clarks Fork Yellow- stone River	3.8	25
	Bluewater Creek	0.71	5
	Bear Creek	0.60	5
	Cottonwood Creek	0.41	5
	Five Mile Creek	0.37	5
Bighorn	Sage Creek	4.6	5
	Crooked Creek	0.67	5
Tongue River	Tongue River	0.483	130
Powder River  (tributaries of Powder River)	Powder River	4.55	200
	Mizpah Creek	0.574	3
	Sheep Creek	0.63	3
	N.F. Sheep Creek	1.288	3
	S.F. Sheep Creek	0.224	3
	Horse Creek	0.322	3
	Meyers Creek	0.63	3
	Locate Creek	0.224	3
	Archdale Creek	0.434	3
	Snow Creek	0.448	3
	Coal Creek	0.896	3
	Bolocate Creek	0.224	3
	Dislocate Creek	0.224	3
	Ten Mile Creek	1.344	3
	Little Powder River	0.084	10
(tributaries of Little Powder River)	Hay Creek	0.14	3
	Allison Creek	0.434	3
	Dry Creek	0.812	3
	Horse Creek	0.504	3
	N.F. Bowers Creek	0.112	3
	Bell Creek	0.014	3
	Wright Creek	0.056	3
	S.F. Wright Creek	0.336	3
	Ranch Creek	0.042	3
	Williams Creek	0.406	3
	Prarie Creek	0.532	3

### FINDINGS OF FACT

1. The U.S. Bureau of Land Management has requested reservation of instream flows for livestock and wildlife watering as shown in table BLM-1 (U.S. Bureau of Land Management, Application No. 12334-r).

#### Findings Related to the Purpose of the Reservation (89-890(3)(a)).

2. The purpose of the instream portion of the U.S. Bureau of Land Management application is to establish minimum instream flows to protect riparian habitat vegetation on national resource lands and to ensure sufficient water instream for stock and wildlife watering (U.S. Bureau of Land Management, Application No. 12334-r).

3. It is established to the satisfaction of the Board that a purpose of the reservation has been shown.

### POWDER SUBBASIN

#### Findings Related to the Need for the Reservation for the Powder Subbasin (89-890(3)(b) and for the Amount Necessary for the Purpose (89-890(3)(c)).

4. The Department of the Fish and Game has been given an instream water reservation for the Powder River for the amount of the ninetieth percentile flow (Board Order #110(b)).

5. Sufficient amount of the instream flow has been reserved for the purpose of protecting wildlife and riparian habitat for the Powder River.

6. There has not been shown a need for an additional instream reservation for the Powder River.

7. It has not been established to the satisfaction of the Board that need for an instream reservation for the Powder River has been shown.

8. If the zone of saturation in streamside water tables drops below root depth for prolonged periods, streamside vegetation dies and new seedlings cannot become established, resulting in ecosystem damage (Tr, Vol. 19, following p. 146)

9. Although the U.S. Bureau of Land Management did not study streamside water tables, root depth, or any other specific variables where instream reservations were applied for, the U.S. Bureau of Land Management instream flow request was in part a general attempt to reserve a sufficient level of instream flow to replenish streamside water tables and prevent such riparian ecosystem damage (Tr. Vol. 19, following p. 146).

10. Water is generally scarce in the Powder River subbasin and certain amounts of water are needed for watering of livestock and wildlife and for the maintenance of the ecological system (U.S. Bureau of Land Management Application No. 12334-r)

11. It is established to the satisfaction of the Board that the amounts of water needed for the purposes of the instream reservations for the following streams are:

a) for tributaries of the Little Powder River which include Hay Creek, Allison Creek, Dry Creek, Horse Creek, N.F. Bowers Creek, Bell Creek, Wright Creek, S.F. Wright Creek, Ranch Creek, Williams Creek, and Prairie Creek an instream reservation is granted of one (1) cfs for each named stream.

b) for tributaries of the Powder River which include Mizpah Cree, Sheep Creek, N.F. Sheep Creek, S.F. Sheep Creek, Horse Creek, Meyers Creek, Locate Creek, Archdale Creek, Snow Creek, Coal Creek, Bolocate Creek, Dislocate Creek and Ten Mile Creek an instream reservation is granted of one (1) cfs for each named stream.

c) for the Little Powder River an instream reservation of three (3) cfs is granted

Finding Related to the Reservation for the Powder Subbasin Being in the Public Interest (89-890(3)(b))

12. It has not been established to the satisfaction of the Board that the U.S. Bureau of Land Management applied for flows for the Powder River is in the public interest.

13. An instream reservation for the tributaries of the Powder River and the Little Powder River and for the Little Powder River are in the public interest because of the need for water for watering of livestock and wildlife. (U.S. Bureau of Land Management Application 12334-r).

14. It is established to the satisfaction of the Board that the instream reservations listed in Finding #12 are in the public interest.

TONGUE SUBBASIN

Findings Related to the Need for the Reservation in the Tongue Subbasin 89-890(3)(b)) and for the Amount Necessary for the Purpose of the Reservation 89-890(3)(c))

15. The Tongue River is controlled and regulated by the Tongue River Demand Reservoir (Draft EIS, Vol. I, p.265).

16. The operation of the Tongue River Dam and Reservoir has provided adequate flows for the protection of the aquatic resource and instream flows in the Tongue River (Draft EIS, Vol. II. p274).

17. Operation of the Tongue River Reservoir will continue to provide ecosystem and economic benefits.

18. The Department of Natural Resources has been granted a reservation for the Tongue River (Board Order # 76 )

19. As stated in its application, it is the intent of the The Department of Natural Resources to repair the existing Tongue River Dam and Reservoir, or to construct a new Tongue River Dam and Reservoir. (Department Of Natural Resources Application No. 9942-r42c)

20. The reservation application of the Montana Department of

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Natural Resources and Conservation and the instream-flow reservation application of the U.S. Bureau of Land Management for the Tongue River are mutually exclusive (Draft EIS, Vol I, p. 216).

21. It has not been established to the satisfaction of the Board that the Applicant has shown that there is a need for an instream reservation of water for the Tongue River.

22. It has not been established to the satisfaction of the Board that any amount of water is necessary for the purpose of a reservation for which there is no need.

Findings Related to the Reservation for the Tongue Subbasin Being in the Public Interest (89-890(3)(d)).

23. It has not been established to the satisfaction of the Board that it is in the public interest to grant a reservation for which there is no need.  
Findings Related to the Need, Amount for the Purpose of the Reservation and the Public Interest (89-890(3)(a)(b)(c)).

24. The Bureau of Land Management has requested an instream reservation for 5 cfs from Five Mile and Crooked Creeks (Application No. 12334-r).

25. There are no other instream reservations requested or granted on Five Mile and Crooked Creeks.

26. An instream reservation is needed on both of these streams to ensure the aquatic habitat and to provide stock water and wildlife water.

27. It is established to the satisfaction of the Board that the need for the instream reservation on Five Mile and Crooked Creeks has been shown and that the reservation is in the public interest.

28. It is established to the satisfaction of the Board that the amount necessary for the purpose of the reservation on Five Mile and Crooked Creeks is 5 cfs.

Findings Related to the Need of the Reservation (89-890(3)(b)).

Upper Yellowstone Basin and the Clarks Fork Yellowstone Basin

29. The Department of Fish and Game has been given an instream water reservation for the following streams:

- (1) Boulder River
- (2) Bridger Creek
- (3) Stillwater River
- (4) Upper Deer Creek
- (5) Lower Deer Creek
- (6) Yellowstone River
- (7) Clarks Fork River
- (8) Bluewater Creek
- (9) Bear Creek
- (10) Cottonwood Creek
- (11) Sage Creek

(Board Order #110).

30. Sufficient amount of the instream flow has been reserved in the streams named in Finding 29 for the purpose of providing wildlife and riparian wildlife habitat. There has not been shown a need for an additional instream reservation for the streams listed in Finding 29.

31. It has not been established to the satisfaction of the Board that any additional amount is necessary for a reservation in the streams listed in Finding 29.

Findings Related to the Public Interest (89-890(3)(d)).

33. It has not been established to the satisfaction of the Board that an additional instream reservation to the United States Bureau of Land Management's application for flows in the Boulder River, Bridger Creek, Stillwater Creek, Upper Deer Creek, Lower Deer Creek, Yellowstone River, Clarks Fork River, Bluewater River, Bear Creek, Cottonwood Creek and Sage Creek is in the public interest.



### CONCLUSIONS OF LAW

1. Chapter 8, Title 89, R.C.M. 1947, and in particular, Section 89-890, R.C.M. 1947, authorizes the adoption by the Montana Board of Natural Resources and Conservation of orders reserving water to qualified applicants for reservations of water.
2. If ordered adopted, a reservation must be ordered adopted in accordance with Chapter 8, Title 89, R.C.M. 1947, and any rules adopted thereunder.
3. The Applicant is entitled to apply to reserve waters within the State of Montana in accordance with Section 89-890, R.C.M. 1947, and any rules adopted thereunder.
4. All pertinent statutes and rules of the State of Montana have been adhered to in the review of this reservation Application, both by the Montana Department of Natural Resources and Conservation and by the Montana Board of Natural Resources and Conservation.
5. Based upon the above Findings of Fact, and specifically based upon any condition, limitation, or modification of the full Application appearing in said Findings, all pertinent criteria delineated at Section 89-890, R.C.M. 1947, and any rules adopted thereunder providing for the adoption of an order reserving water have been met.
6. Nothing found herein has bearing upon the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything found herein have bearing on the status of claimed water rights of any other party except in relation to those rights herein newly applied for, to the extent necessary to reach a conclusion herein.